

**Matter of Vaglica v Board of Fire Commrs. New Hyde
Park Fire Dept.**

2009 NY Slip Op 32725(U)

November 6, 2009

Supreme Court, Nassau County

Docket Number: 8311/2009

Judge: R. Bruce Cozzens

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.

Justice.

TRIAL/IAS PART 7
NASSAU COUNTY

In the Matter of
Ex-Chief ANTHONY VAGLICA,

Petitioner(s),

-against-

MOTION #001
INDEX#8311/2009
MOTION DATE:
August 5, 2009

BOARD OF FIRE COMMISSIONERS
NEW HYDE PARK FIRE DEPARTMENT,

Respondent(s).

The following papers read on this motion:

Notice of Petition.....	1
Answer.....	1
Reply Affidavits.....	1
Briefs: Respondent's.....	1

Upon the foregoing papers, petitioner, Ex-Chief Anthony Vaglica (hereinafter Vaglica) makes an application to vacate the decision of the respondents, Board of Fire Commissioners New Hyde Park Fire Department, discharging vaglica from the New Hyde Park Fire Department, and reinstating petitioner thereto, as an abuse of discretion of the respondent, and for such other and further relief as may be deemed just.

Petitioner Vaglica is an ex-chief of the New Hyde Park Fire Department. He was serving as a volunteer firefighter in 2007 and 2008 until his dismissal from membership by respondent, Board of Fire Commissioners of the New Hyde Park Fire Department on December 16, 2008. His dismissal was related to events that occurred on April 10, 2008.

There were three charges brought against Ex-Chief Vaglica. This first charge was that Vaglica engaged in conduct unbecoming a member and whose actions brought disgrace upon the department and himself by engaging in a course of conduct that resulted in firefighter, Chiofalo being physically struck by Vaglica's brother Mario Vaglica. Vaglica's actions were

in violation of Rule 6 §2 of the Rules and Regulations of the New Hyde Park Fire District. The second charge was that Vaglica engaged in conduct unbecoming a member and whose actions brought disgrace upon the department and himself by speaking in a hostile and inappropriate manner to Chief John DiVello when he informed Vaglica that he was suspending him based upon the circumstances that led to firefighter, Chiofalo being physically struck by Vaglica's brother, Mario Vaglica. This conduct was in violation of the Rule 6 §2 and Rule 7 §4 of the Rules and Regulations of the New Hyde Park Fire District. The third charge against Vaglica was that he engaged in conduct unbecoming of a member and whose actions brought disgrace upon the department and himself and that you repeatedly approached firefighter Chiofalo between September 7, 2007 and April 1, 2008 on the fire district and that locations where the fire department was on duty and demanded that he pay a debt allegedly owed to Vaglica. This was in violation of Rule 6 §2 of the Rules and Regulations of the New Hyde Park Fire District.

A hearing was held on August 5, 2008 regarding the above charges brought against Vaglica. At the conclusion of the hearing, the hearing officer concluded that the Board of Commissioners for New Hyde Park Fire Department sustained the charges against Vaglica and he recommended that Vaglica be discharged from the fire department. On November 18, 2008 the Board of Fire Commissioners considered the hearing officer's report and voted to accept and approve his findings of guilt on the charges as stated therein. The final ruling was made at a Board of Commissioners meeting on December 16, 2008. The Board of Commissioners found that the appropriate penalty for Vaglica is dismissal from membership of the New Hyde Park Fire Department. Vaglica made an application that the Court vacate the decision of the Board of Commissioners, and reinstate him as a member of the New Hyde Park Fire Department.

Under CPLR §7803, "the only questions that may be raised in a proceeding under this article are: 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence." CPLR Article 7803 [4]. "Judicial review of an administrative determination after a hearing required by law is limited to whether that determination is supported by substantial evidence." *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179, 379 NE2d 1183, 408 NYS 2d 54 [1978]. "It is well settled that in reviewing administrative action a Court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision of whether it is arbitrary and capricious." *Pell v Bd. of Ed. of Union Free Sch. Dist. No. 1 of Town of Scarsdale and Mamaroneck*, 34 NY2d 222, 231, 356 NYS2d 833,839 [1974], *see also*, *Flacke v Onondaga Landfill Sys.*, 69 NY2d 355,363, 507 NE2d 282, 514 NYS2d 689 [1987].

"The courts may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists." *Stork Rest. v Boland*, 282 NY

256, 267 [1976], quoted in *Collins v Codd*, 38 NY2d 269, 270-271 [1940]. "Consequently, even if a different conclusions could be reached as a result of the conflicting evidence, a Court may not substitute its judgment for that of the agency where the agency's determination is supported by the record." *Pell v Bd. of Ed. of Union Free Sch. Dist. No. 1 of Town of Scarsdale and Mamaroneck*, *supra* at 231, *see also*, *Lane Const. Corp. v Cahill*, 270 AD2d 609, 704 NYS2d 687 [2000].

In the case at issue, the hearing officer conducted the hearing and found Ex-Chief Vaglica guilty of certain charges and recommended that he be removed from membership in the New Hyde Park Fire Department. The hearing officer determined that the testimony of Mr. Chiofalo was credible and established substantial evidence for charges one and three. The hearing officer also found the testimony of Chief Divello to be credible and established substantial evidence for charged number two. The Board of Fire Commissioners considered the hearing officers report and voted to accept and approve his findings of guilt on the charges stated in the report. The evidence in this case produced substantial evidence to support each of the charges and the finding of guilt. The hearing officer and the board had a rational basis for the decisions they made, they wanted to maintain a safe workplace without violence or threats of violence. The decision was not arbitrary or capricious. This Court has no reason to modify the decision of the hearing officer or Board of Fire Commissioners.

Under CPLR article 7803, "the only questions that can be raised in a proceeding under this article are: 3. Whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse as to the measure of mode of penalty or discipline imposed." CPLR § 7803 (3). The courts have repeatedly found that the penalty imposed by an administrative agency may not be set aside unless the discipline imposed is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." *Pell v Bd. of Ed. of Union Free Sch. Dist. No. 1 of Town of Scarsdale and Mamaroneck*, *supra* at 233. In this regard, we note that a high degree of deference is to be accorded to an agency's determination of the appropriate penalty to be imposed. *Berenhaus v. Ward*, 70 N.Y.2d 436 [198]. "[W]e must accord great leeway to the Commissioner's determination concerning appropriate punishment, because he, and not the courts, is accountable to the public for the integrity of the department." *Pell v Bd. of Ed. of Union Free Sch. Dist. No. 1 of Town of Scarsdale and Mamaroneck*, *supra* at 237.

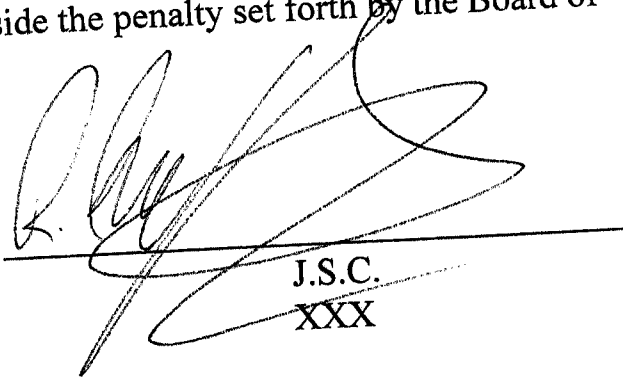
In this case, the Board of Commissioners reviewed the conduct of respondent, and was concerned with the assault and injury sustained by firefighter Chiofalo. The Board considered the problems that all volunteer fire departments face with regard to recruitment and retention of volunteers. They understand that it may be counterintuitive to dismiss longtime active volunteer firefighters from their service. They feel in order to recruit and retain new members

to the fire department, it is important to rid violence and threats of violence from the department. The Board also feels it is important to maintain discipline and morale within the fire department. The Board feels that dismissal of Ex-Chief Vaglica is therefore warranted. This Court finds that the Board of Commissioners did not abuse its discretion when opting to terminate Ex-Chief Vaglica's membership in the New Hyde Park Fire Department. Termination from the fire department is not a penalty that is disproportionate to the offenses committed by respondent. The Court will not set aside the penalty set forth by the Board of Commissioners.

As such, the petition is denied.

Dated:

NOV 6 2009



J.S.C.
XXX

ENTERED

NOV 12 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**